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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: OCT 12 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursery and tree production business. It seeks to employ the beneficiary permanently in the United States as a safety and maintenance manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification, which the Department of Labor (DOL) approved, accompanied the petition. The director determined that the petitioner had failed to demonstrate that the beneficiary was a member of the professions holding an advanced degree.

On appeal, the petitioner asserts for the first time that the beneficiary qualifies as an alien of exceptional ability. For the reasons discussed below, the beneficiary does not qualify either as an advanced degree professional or an alien of exceptional ability. Moreover, the job does not require either an advanced degree professional or an alien of exceptional ability.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

I. Member of the Professions Holding an Advanced Degree

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in business administration is the minimum level of education required. Line 5 reflects that two years of training in safety, maintenance, inspection, and quality control are required. Line 6 reflects that four years of experience in the job offered are required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Specifically, vocational education and twelve years of experience may be acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

The petitioner indicated that only a bachelor's degree, two years of training, and four years of experience or vocational education, two years of training, and twelve years of experience were required. Thus, the position does not require a member of the professions holding an advanced degree.

II. Exceptional Ability

On appeal, the petitioner asserts that the director should have instead evaluated the petition as being for an alien of exceptional ability. The AAO notes that the petitioner has not raised its desire to classify the position as being for an alien of exceptional ability before. The only indication within the record of proceeding to this effect is that someone highlighted the words "alien of exceptional ability" on the petition. Notwithstanding, the AAO will consider the evidence the petitioner has submitted, as the director never evaluated the position under this other category. The AAO finds this approach to be the most expedient possible measure and will therefore not remand the decision back to the director for his further review.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
>
> (C) A license to practice the profession or certification for a particular profession or occupation
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
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> (E) Evidence of membership in professional associations
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter. In reviewing Service Center decisions, the AAO will apply the test set forth in

Kazarian. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See* 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d at 145; *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043 (recognizing the AAO's *de novo* authority). In this instance, the director did not conduct a review of the alien's potential exceptional ability.

Evidentiary Criteria

The AAO notes that the petitioner has failed to submit certified Spanish to English translations of the documents submitted regarding the beneficiary's past academic and professional experience pursuant to 8 C.F.R. § 103.2(b)(3). These uncertified translations accordingly have no evidentiary value. Nevertheless, in the interest of thoroughness, the AAO will consider their content.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

The record contains evidence that the beneficiary completed 140 hours of vocational education in locks maintenance in 1993 from the [redacted] as well as 50 hours of vocational education in personnel supervision in 1982 and 72 hours of vocational education as an administrative assistant in 1981 from the [redacted] The beneficiary also completed vocational studies from the same institution to be an electrician in 1978, to be a commercial secretary in 1977, and to be an accounting assistant in 1977. The beneficiary studied to be an office clerk in 1976 from the [redacted] The beneficiary additionally completed vocational education to be an industrial, electrical, refrigeration, and AC technician from the [redacted] in 1981 and to be an integral quality control employee from the [redacted] n 1980, both in [redacted] The AAO finds that this evidence does not qualify under the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A), as none of these studies directly relate to the proffered position of safety and maintenance manager, the area of alleged exceptional ability.

The petitioner has asserted that the beneficiary's prior work experience is equivalent to a bachelor's degree in the United States. The AAO notes, though, that there is a separate criterion for experience listed below in order for an alien to meet the exceptional ability classification.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires that the ten years of experience be "in the occupation" in which the petitioner intends to work. In this case, that occupation is safety and maintenance manager. The petitioner submitted evidence purporting to establish his prior employment as the president of maintenance and security for TVM Multiservicios

[redacted] starting in 1994 and continuing through 2007. The AAO notes that the letter only states that the beneficiary was the president of the business. The letter does not provide evidence of the services that company provided. Without more evidence of the petitioner's duties at [redacted] the petitioner cannot establish that this experience was "in the occupation" in which he now seeks to work. Thus, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B).

A license to practice the profession or certification for a particular profession or occupation

The petitioner has not submitted any evidence demonstrating that the beneficiary possesses a license to practice in the profession or a certification or licensure for the profession or occupation. The AAO notes that the petitioner has submitted documentation showing that the beneficiary maintained a gun license in [redacted] However, the AAO finds that such licensure is not relevant to the duties of the position of safety and maintenance manager in the United States. Thus, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner has submitted a signed letter from the beneficiary's prior employer, [redacted], stating that he earned $15,000.00 per month ($180,000.00 per year). The petitioner also submitted a letter from the beneficiary's bank in [redacted] stating that he maintained checking account balances amounting to approximately six figures and savings account balances amounting to approximately five figures. Though the petitioner has demonstrated that the beneficiary earned a sizeable income and maintained substantial savings, the petitioner has failed to demonstrate that the beneficiary commanded a salary indicative of exceptional ability by submitting evidence of comparable wages in the occupation in [redacted] The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires not only evidence of a salary or other remuneration, but evidence that the salary or remuneration "demonstrates exceptional ability." In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Evidence of membership in professional associations

The petitioner has not submitted any evidence demonstrating that the beneficiary is a member of any professional associations. Thus, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner has submitted evidence demonstrating that the beneficiary received training from and recognition for his superior performance working for the [redacted] However, the AAO notes that the beneficiary worked as a police inspector, security coordinator, and maintenance supervisor for that entity – never as a safety and maintenance manager. Furthermore, the certificates of recognition that the petitioner submitted do not demonstrate recognition for significant contributions to the industry or field. [redacted] they demonstrate the beneficiary's teamwork and collaboration, not the beneficiary's unique and exceptional contributions. Thus, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In light of the above, the petitioner has not submitted evidence that qualifies under three of the evidentiary criteria. [redacted], the petitioner only submitted qualifying evidence that meets the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii)(B). Nevertheless, the AAO will next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2). Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, in the AAO's final merits determination, the AAO must determine whether the beneficiary's vocational training is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field of safety and maintenance management.

The petitioner has not documented that vocational training is indicative of a degree of expertise significantly above that ordinarily encountered in safety and maintenance management.

Even though the AAO accepts the petitioner's experience as a president of maintenance and security for [redacted] as having met the requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(B), the petitioner has not established how this experience represents a degree of expertise significantly above that ordinarily encountered with safety and maintenance managers.

The beneficiary's vocational education was not in the field of the proffered position, the beneficiary possesses no licensure or certification in the proffered profession, the petitioner has failed to establish that the beneficiary commanded a salary significantly greater than other safety and service managers, the beneficiary is not a member of any professional associations, and the petitioner has not provided evidence demonstrating recognition of the beneficiary for achievements and significant contributions to his industry or field.

In summary, even assuming that the beneficiary's experience is relevant, the only noteworthy evidence is his attainment of over ten years of experience in the specialty. As stated above, the regulation at

8 C.F.R. § 204.5(k)(3)(ii) provides that the possession of ten or more years of experience be in the occupation shall not by itself be considered sufficient evidence of exceptional ability. After careful review of all the evidence of record, the evidence does not support a finding that the beneficiary qualifies as a safety and maintenance manager of exceptional ability.

With regard to whether the job requires an alien of exceptional ability, an individual may qualify for the proffered position with less than ten years of experience. The petitioner is also only offering the DOL certified prevailing wage for the position. Further, part H line 14 of the alien employment certification states that the position does not require any licensing or membership in professional organizations. Accordingly, the AAO finds that the position of safety and maintenance manager does not require an alien with exceptional ability.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.